

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JOLENE R. STINSON-WALKER,

Case No.: 3:19-cv-00334-WGC

**Plaintiff**

## Order

V.

Re: ECF Nos. 14, 16

**ANDREW SAUL,**  
Acting Commissioner of  
Social Security Administration,

## Defendant

11 Before the court is Plaintiff's Motion for Reversal and/or Remand. (ECF No. 14.) The  
12 Commissioner filed a Cross-Motion to Affirm and Opposition to Plaintiff's motion. (ECF Nos.  
13 16, 17.)

14 After a thorough review, Plaintiff's motion is granted, and the Commissioner's cross-  
15 motion to affirm is denied.

## **I. BACKGROUND**

17 On March 31, 2014, Plaintiff completed applications for disability insurance benefits  
18 (DIB) under Title II of the Social Security Act and for supplemental security income (SSI) under  
19 Title XVI of the Social Security Act, alleging disability beginning March 31, 2011.

20 (Administrative Record (AR) 313.) The applications were denied initially. (AR 168-174)

21 Plaintiff requested a hearing before an administrative law judge (ALJ). (AR 175-176.)

22 ALJ Kathryn Burgchardt held a hearing on March 15, 2016. (AR 61-105.) Plaintiff, who was  
23 represented by counsel, appeared and testified on her own behalf at the hearing. Testimony was

1 also taken from a vocational expert (VE). On May 2, 2016, the ALJ issued a decision finding  
2 Plaintiff not disabled. (AR 138-155.)

3 Plaintiff requested review, and the Appeals Council granted the request and remanded the  
4 case to the ALJ. The Appeals counsel stated that HALLEX I-2-6-74 provides that an ALJ must  
5 ask the claimant and the representative whether they have any objection(s) to the VE testifying,  
6 and rule on any objection, and the claimant and his representative have a right to question the VE  
7 fully on any pertinent matter within the VE's area of expertise. The Appeals Council found the  
8 ALJ did not rule on Plaintiff's representative's post-hearing objections to the VE testimony, and  
9 the ALJ asked the representative to stop objecting to VE testimony. In addition, when the  
10 representative asked the VE to answer questions regarding the source of the job data, the ALJ  
11 interrupted and refused to allow the VE to answer. On remand, the Appeals Council instructed  
12 the ALJ to allow the representative to question the VE on matters within the VE's area of  
13 expertise, and if warranted, the ALJ was to expand the record, obtain supplemental evidence  
14 from a VE to clarify the effect of the assessed limitations on the claimant's occupational base. In  
15 addition, the ALJ was directed, before relying on the VE evidence, to identify and resolve any  
16 conflicts between the occupational evidence provided by the VE and the information in the  
17 Dictionary of Occupational Titles (DOT) and its companion publication, the Selected  
18 Characteristics of Occupations. (AR 163-164.)

19 ALJ Burgchardt held a second hearing on April 10, 2018. (AR 33-60.) Plaintiff was again  
20 represented by counsel, and the VE was questioned by both the ALJ and Plaintiff's counsel. On  
21 July 31, 2018, ALJ Burgchardt issued a second decision finding Plaintiff not disabled. (AR 13-  
22 25.) Plaintiff requested review of the ALJ's second decision, and the Appeals Council declined  
23 review, making the ALJ's decision the final decision of the Commissioner. (AR 1-6.)

1 Plaintiff then commenced this action for judicial review under 42 U.S.C. § 405(g).

2 Plaintiff argues: (1) the ALJ erred in relying on VE testimony to fulfill her step 5 burden without  
3 addressing pre-hearing evidence and post-hearing objections that raised the issue of reliability of  
4 the VE's testimony; and (2) the ALJ erred when she failed to properly evaluate the medical  
5 opinion evidence.

6 The Commissioner, on the other hand, argues that the VE's testimony was substantial  
7 evidence in support of the ALJ's step five finding that Plaintiff was not disabled; and the ALJ  
8 properly evaluated the opinion evidence.

9 **II. STANDARDS**

10 **A. Disability Process**

11 "The Social Security Administration (SSA) provides benefits to individuals who cannot  
12 obtain work because of a physical or mental disability." *Biestek v. Berryhill*, 139 S.Ct. 1148,  
13 1151-52 (2019). A claimant may apply for disability insurance benefits (DIB) under Title II of  
14 the Social Security Act, and/or supplemental security income (SSI) benefits under Title XVI of  
15 the Act. SSI benefits are based on need, and to be eligible a claimant must be "aged, blind or  
16 disabled" and have income and resources under certain thresholds. 42 U.S.C. § 1382(a). DIB are  
17 based on earnings, and the claimant must be disabled and have contributed to the insurance trust  
18 fund through deductions in wages. 42 U.S.C. § 401(b). DIB, unlike SSI, are limited to a certain  
19 period of insurance determined by the amount of the claimant's previously taxed earnings. 42  
20 U.S.C. § 423(c)(1). Title 20 of the Code of Federal Regulations contains SSA's regulations.  
21 Those that start with 404 are Title II regulations. Those that start with 416 are Title XVI  
22 regulations.

1 After a claimant files an application for disability benefits, a disability examiner at the  
2 state Disability Determination agency, working with a doctor(s), makes the initial decision on the  
3 claimant's application. *See* 20 C.F.R. §§ 404.900(a)(1); 416.1400(a)(1). If the agency denies the  
4 claim initially, the claimant may request reconsideration of the denial, and the case is sent to a  
5 different disability examiner for a new decision. *See* 20 C.F.R. §§ 404.900(a)(2), 416.1400(a)(2).

6 If the agency denies the claim on reconsideration, the claimant may request a hearing and the  
7 case is sent to an ALJ who works for the Social Security Administration. *See* 20 C.F.R. §§  
8 404.900(a)(3), 416.1400(a)(3). The ALJ issues a written decision after the hearing.

9 *See* 20 C.F.R. § 404.900(a)(3). If the ALJ denies the claim, the claimant may request review by  
10 the Appeals Council. *See* 20 C.F.R. §§ 404.900(a)(4), 416.1400(a)(4). If the Appeals Council  
11 determines there is merit to the claim, it generally remands the case to the ALJ for a new hearing.  
12 If the Appeals Council denies review, the claimant can file an action in the United States District  
13 Court. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.900(a)(5), 416.1400(a)(5).

14 **B. Five-Step Evaluation of Disability**

15 Under the Social Security Act, "disability" is the inability to engage "in any substantial  
16 gainful activity by reason of any medically determinable physical or mental impairment which  
17 can be expected to result in death or which has lasted or can be expected to last for a continuous  
18 period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant is disabled if his or  
19 her physical or mental impairment(s) are so severe as to preclude the claimant from doing not  
20 only his or her previous work but also, any other work which exists in the national economy,  
21 considering his age, education and work experience. 42 U.S.C. § 1382c(a)(3)(B).

22 The Commissioner has established a five-step sequential process for determining whether  
23 a person is disabled. 20 C.F.R. §404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S.

1 137, 140-41 (1987). In the first step, the Commissioner determines whether the claimant is  
2 engaged in "substantial gainful activity"; if so, a finding of nondisability is made and the claim is  
3 denied. 20 C.F.R. § 404.152(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the  
4 claimant is not engaged in substantial gainful activity, the Commissioner proceeds to step two.

5       The second step requires the Commissioner to determine whether the claimant's  
6 impairment or combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and  
7 § 416.920(a)(4)(ii), (c); *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly  
8 limits the claimant's physical or mental ability to do basic work activities. *Id.* If the claimant has  
9 an impairment(s) that is severe, the Commissioner proceeds to step three.

10       In the third step, the Commissioner looks at a number of specific impairments listed in  
11 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the  
12 claimant's impairment(s) meets or is the equivalent of one of the Listed Impairments. 20 C.F.R.  
13 § 404.1520(a)(4)(iii), (d) and § 416.920(a)(4)(iii), (d). The Commissioner presumes the Listed  
14 Impairments are severe enough to preclude any gainful activity, regardless of age, education or  
15 work experience. 20 C.F.R. § 404.1525(a), § 416.925(a). If the claimant's impairment meets or  
16 equals one of the Listed Impairments, and is of sufficient duration, the claimant is conclusively  
17 presumed disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(a)(4)(iii), (d). If the claimant's  
18 impairment is severe, but does not meet or equal one of the Listed Impairments, the  
19 Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141.

20       At step four, the Commissioner determines whether the claimant can still perform "past  
21 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past  
22 relevant work is that which a claimant performed in the last 15 years, which lasted long enough  
23

1 for him or her to learn to do it, and was substantial gainful activity. 20 C.F.R. § 404.1565(a) and  
 2 § 416.920(a).

3 In making this determination, the Commissioner assesses the claimant's residual  
 4 functional capacity (RFC) and the physical and mental demands of the work previously  
 5 performed. *See id.*; 20 C.F.R. § 404.1520(a)(4)(v), § 416.920(a)(4)(v); *see also Berry v. Astrue*,  
 6 622 F.3d 1228, 1231 (9th Cir. 2010). RFC is what the claimant can still do despite his or her  
 7 limitations. 20 C.F.R. § 404.1545 and § 416.945. In determining the RFC, the Commissioner  
 8 must assess all evidence, including the claimant's and others' descriptions of the limitation(s),  
 9 and medical reports, to determine what capacity the claimant has for work despite his or her  
 10 impairments. 20 C.F.R. § 404.1545(a)(3) and 416.945(a)(3).

11 A claimant can return to previous work if he or she can perform the work as he or she  
 12 actually performed it, *i.e.*, if he or she can perform the "actual functional demands and job duties  
 13 of a particular past relevant job," or as generally performed, *i.e.*, "[t]he functional demands and  
 14 job duties of the [past] occupation as generally required by employers throughout the national  
 15 economy." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and  
 16 citation omitted). If the claimant can still do past relevant work, then he or she is not disabled. 20  
 17 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131.

18 If, however, the claimant cannot perform past relevant work, the burden shifts to the  
 19 Commissioner to establish at step five that the claimant can perform other work available in the  
 20 national economy. 20 C.F.R. §§ 404.1520(e), 416.920(e); *see also Yuckert*, 482 U.S. at 141-42,  
 21 144. This means "work which exists in significant numbers either in the region where such  
 22 individual lives or in several regions of the country." *Gutierrez v. Comm'r of Soc. Sec. Admin.*,  
 23 740 F.3d 519, 528 (9th Cir. 2014). The Commissioner must also consider the claimant's RFC,

1 age, education, and past work experience to determine whether the claimant can do other work.  
 2 *Yuckert*, 482 U.S. at 141-42. The Commissioner may meet this burden either through the  
 3 testimony of a VE or by reference to the Grids. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir.  
 4 1999).<sup>1</sup>

5 If at step five the Commissioner establishes that the claimant can do other work which  
 6 exists in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566(b),  
 7 § 416.966(b). Conversely, if the Commissioner determines the claimant unable to adjust to any  
 8 other work, the claimant will be found disabled. 20 C.F.R. § 404.1520(g), § 416.920(g); *see also*  
 9 *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010); *Valentine v.*  
 10 *Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

### 11 C. Judicial Review & Substantial Evidence

12 The court must affirm the ALJ's determination if it is based on proper legal standards and  
 13 the findings are supported by substantial evidence in the record. *Gutierrez*, 740 F.3d at 522  
 14 (citing 42 U.S.C. § 405(g)). "Substantial evidence is 'more than a mere scintilla but less than a  
 15 preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to  
 16 support a conclusion.' *Id.* at 523-24 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir.  
 17 2012)).

18 To determine whether substantial evidence exists, the court must look at the record as a  
 19 whole, considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*,  
 20 740 F.3d at 524 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "may  
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22 <sup>1</sup> "The grids are matrices of the four factors identified by Congress—physical ability, age,  
 23 education, and work experience—and set forth rules that identify whether jobs requiring specific  
 combinations of these factors exist in significant numbers in the national economy." *Lockwood v.*  
*Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (internal quotation marks and  
 citation omitted).

1 not affirm simply by isolating a specific quantum of supporting evidence.'" *Garrison v. Colvin*,  
 2 759 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th  
 3 Cir. 2007)). "'The ALJ is responsible for determining credibility, resolving conflicts in medical  
 4 testimony, and for resolving ambiguities.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039  
 5 (9th Cir. 1995)). "If the evidence can reasonably support either affirming or reversing, 'the  
 6 reviewing court may not substitute its judgment' for that of the Commissioner." *Gutierrez*, 740  
 7 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)). That being said,  
 8 "a decision supported by substantial evidence will still be set aside if the ALJ did not apply  
 9 proper legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th  
 10 Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In addition, the court will  
 11 "review only the reasons provided by the ALJ in the disability determination and may not affirm  
 12 the ALJ on a ground upon which he did not rely." *Garrison*, 759 F.3d at 1010 (citing *Connett v.*  
 13 *Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

### 14                   III. DISCUSSION

#### 15           **A. ALJ's Findings in this Case**

16           At step one, the ALJ found Plaintiff met the insured status requirements through March  
 17 31, 2012, and had not engaged in substantial gainful activity since the alleged onset date.  
 18 (AR 19.)

19           At step two, the ALJ concluded Plaintiff had the following severe impairments: history of  
 20 right foot injury requiring surgery; migraines; degenerative disc disease of the lumbar spine;  
 21 asthma; depressive disorder; and post-traumatic stress disorder (PTSD). (AR 19.)

22           At step three, the ALJ determined Plaintiff did not have an impairment or combination of  
 23 impairments that met or medically equaled the severity of one of the Listed Impairments.

1 (AR 19.)

2 At step four, the ALJ assessed Plaintiff as having the RFC to perform light work, except:  
3 Plaintiff would require unskilled work with SVP of one to two, performing only routine tasks  
4 with simple decision making; she could not work in close proximity to supervisors or coworkers  
5 (meaning that she could not function as a member of a team), and could not have frequent or  
6 prolonged direct contact with the public; she could lift and/or carry 10 pounds frequently and 20  
7 pounds occasionally; she could stand and/or walk with normal breaks for two hours in an eight-  
8 hour workday; she could sit, with normal breaks, for six hours in an eight-hour workday; she  
9 could perform pushing and pulling motions with her upper and lower extremities within these  
10 weight restrictions, but was limited to occasionally pushing and pulling with the right lower  
11 extremity; she should be restricted to a relatively clean work environment, meaning low levels of  
12 pollutants; she could frequently balance, stoop, kneel and crawl; she could occasionally climb  
13 ladders, ropes and scaffolds; and, she could occasionally crouch and climb ramps and stairs.

14 (AR 21.)

15 The ALJ then concluded Plaintiff was unable to perform any past relevant work. (AR 23.)

16 At step five, the ALJ determined, based on VE testimony, that considering Plaintiff's age,  
17 education, work experience and RFC, there were jobs that exist in significant numbers in the  
18 national economy that Plaintiff could perform, including: final assembler (DOT 713.687-018),  
19 products assembler (DOT 706.687-010), and an electronics worker (DOT 726.687-010). The  
20 ALJ stated that the VE's testimony was consistent with the information in the DOT,  
21 supplemented by the VE's experience. (AR 24.)

22 The ALJ acknowledged that after the previous hearing, and the most recent hearing,  
23 Plaintiff's representative objected to the VE testimony, and particularly to the jobs cited by the

1 VE and the number of jobs available in the national economy. The ALJ stated that Plaintiff's  
2 representative's objections were overruled, concluding that the regulations require the ALJ to  
3 take administrative notice of several sources of reliable job information, including the DOT, and  
4 specifically permit the use of a VE or other specialist to assist in determining whether an  
5 individual is disabled. In addition, the ALJ said that 20 C.F.R. § 416.968 provides definitions for  
6 skill requirements of unskilled, semi-skilled and skilled work that do not correspond directly  
7 with reasoning levels as listed in the DOT, but are related to levels of specific vocational  
8 preparation, as explained in Social Security Ruling (SSR) 00-4p. To the extent Plaintiff's  
9 representative was arguing that job definitions are outdated in the DOT or that job numbers  
10 obtained from the sources listed in 20 C.F.R. 416.966(d) are vague or unreliable, the ALJ found  
11 that those arguments were foreclosed by regulation. (AR 24-25.)

12 As a result, the ALJ found Plaintiff not disabled from the alleged onset date through the  
13 date of the decision. (AR 25.)

14 **B. VE Testimony**

15 Plaintiff argues that the ALJ erred in relying on VE testimony to fulfill her step 5 burden  
16 without addressing pre-hearing evidence and post-hearing objections that raised the issue of  
17 reliability of the VE's testimony. This argument has two components: (1) that the ALJ did not  
18 adequately address two vocational rehabilitation counselor opinions submitted by Plaintiff  
19 (before and after the hearing) that contradicted the VE's testimony at the hearing that relied on  
20 the DOT; and (2) the VE testified, and the ALJ adopted the testimony, that Plaintiff could  
21 perform certain jobs that exist in the national economy that are classified by the DOT as  
22 unskilled, but the ALJ failed to appropriately address conflicting evidence presented by Plaintiff  
23 that those jobs are not currently performed at the unskilled level.

1       The Commissioner argues that the ALJ may rely on VE testimony to find a claimant can  
 2 perform certain jobs and is not disabled. The Commissioner acknowledges that Plaintiff  
 3 challenged the VE's testimony with the report from a vocational rehabilitation counselor<sup>2</sup>, but  
 4 asserts that in overruling Plaintiff's objections to the VE's testimony in her decision, the ALJ  
 5 implicitly relied on the VE instead of Plaintiff's vocational rehabilitation counselor, and was  
 6 permitted to do so.

7           **1. Plaintiff's Vocational Rehabilitation Counselor Reports**

8              **a. The Moran Report**

9       Before the April 2018 hearing, Plaintiff submitted a brief to the ALJ that included as an  
 10 exhibit the vocational report from Kerri Moran, Vocational Rehabilitation Counselor. (AR 480-  
 11 487.)

12       Ms. Moran opined that based on her experience, "a limitation of occasional interaction  
 13 with coworkers and supervisors precludes all work as the training and probationary period for  
 14 any job would require more than occasional interaction with co-workers and supervisors." (AR  
 15 486.) She said this is true even for entry-level positions, because "extensive training is required  
 16 on the job wherein a new employee is paired with a supervisor and/or colleague." (*Id.*)

17       In addition, Ms. Moran opined that the limitation to work in a clean work environment  
 18 with low pollutants "would require an accommodation" because "[o]ffice and school  
 19 environments are often riddled with dust and allergens" and poor indoor air quality is prevalent.  
 20 (*Id.*)

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 23       <sup>2</sup> The Commissioner discusses the report from one of Plaintiff's vocational rehabilitation  
 counselors (Ms. Moran), but does not address the report presented post-hearing from the other  
 (Ms. Santagati).

1                   **b. The Santagati Report**

2                 In addition, Plaintiff submitted a post-hearing memorandum and objections to the VE's  
3 testimony, which included the report of Paula Santagati, Senior Vocational Rehabilitation  
4 Counselor. (Objections at AR 495-506, Santagati Report at AR 535-536.) Like Ms. Moran,  
5 Ms. Santagati also opined that a limitation of occasional interaction with coworkers and  
6 supervisors precludes all work because the training and probationary period for any job would  
7 require more than occasional interaction with co-workers and supervisors. She also said this was  
8 true even in positions that are entry-level, which require training by pairing a new employee with  
9 a supervisor and/or colleague.

10               She cited specific data from several employers to support her opinion. For instance,  
11 Shaw's Supermarket reported that most candidates would be ready to work on their own within 3  
12 days, but Ms. Santagati said that a person limited to occasional interaction could not complete  
13 these three days of training alongside a supervisor/colleague, and therefore, could not sustain the  
14 job. Next, she cited the example of a dishwasher for Healthcare Services, who provides up to six  
15 weeks of on the job training where the new hire is paired with the kitchen manager and then  
16 colleagues. A person with these restrictions would not be able to complete the training. In  
17 addition, factory work at Gillette requires training that can be completed by the end of one shift,  
18 but due to the physical proximity of other works and interdependence on one part of the job for  
19 the other to happen, interaction with coworkers is constant. Finally, she cited Merry Maids as  
20 another example. Merry Maids pairs new hires with another team for training even when a new  
21 hire has experience. In that case, interpersonal contact would exceed an occasional limitation in  
22 this regard. (AR 535.)

1                   **c. Analysis**

2         The ALJ did not discuss or acknowledge the reports of Ms. Moran or Ms. Santagati. The  
 3 Commissioner argues that the ALJ implicitly overruled the objections raised by Ms. Moran and  
 4 Ms. Santagati when she adopted the VE's testimony. The VE did not provide any testimony  
 5 regarding the objections raised by Ms. Moran and Ms. Santagati. Nor did the ALJ provide any  
 6 explanation for adopting the VE's testimony over that of Ms. Moran and Ms. Santagati. As a  
 7 result, the court finds that the ALJ erred. 42 U.S.C. § 423(d)(5)(B) ("In making any  
 8 determination with respect to whether an individual is under a disability or continues to be under  
 9 a disability, the Commissioner of Social Security shall consider *all* evidence available in such  
 10 individual's case record[.]") (emphasis added).

11         Remand is appropriate for the ALJ to specifically consider and address the reports of  
 12 Ms. Moran and Ms. Santagati, and reconcile the conflict between their reports and the VE's  
 13 testimony. If the ALJ opts to adopt the VE's testimony over that of Ms. Moran and Ms.  
 14 Santagati, the ALJ must provide a reasonable explanation.

15                   **2. Unskilled (DOT) vs Skilled Work (O\*NET)**

16         Plaintiff also presented evidence demonstrating that the step 5 jobs identified by the VE,  
 17 and adopted by the ALJ, no longer exist as unskilled work in the national economy.

18         The jobs identified by the VE as existing in significant numbers in the national economy  
 19 that Plaintiff could do are: final assembler, production assembler, and electronics worker.  
 20 Plaintiff objected to these jobs on the basis that according to current labor market data none of  
 21 them are performed at the unskilled level, and therefore, would exceed the limitation to simple  
 22 work in the RFC. Plaintiff argues that while the positions were described in the DOT as  
 23 unskilled, the DOT was last meaningfully updated over 40 years ago, and the jobs are not

1 currently performed as unskilled work, based on up-to-date information provided by the United  
2 States Department of Labor (USDOL). Plaintiff asserted that vocational information found in the  
3 Occupational Information Network (O\*NET) and the Occupational Employment Statistics did  
4 not support the VE's testimony that the jobs are currently performed as unskilled work.  
5 (AR 500.)

6 In overruling Plaintiff's objections, the ALJ said that the regulations require the ALJ to  
7 take administrative notice of several sources of reliable job information, including the DOT, and  
8 permit the use of a VE to assist in determining whether an individual is disabled, citing 20 C.F.R.  
9 § 416.966(d). In addition, the ALJ said that 20 C.F.R. § 416.968 provides definitions for skill  
10 requirements of unskilled, semi-skilled, and skilled work, that do not correspond directly with  
11 the reasoning levels listed in the DOT, but instead are related to levels of specific vocational  
12 preparation (SVP), as explained in Social Security ruling 00-4p. The ALJ said that to the extent  
13 Plaintiff argued that the job definitions were outdated in the DOT, the argument was foreclosed  
14 by regulation. (AR 25.)

15 While the ALJ said that the "regulations" foreclosed this argument, Plaintiff contends that  
16 the ALJ did not cite the regulation that supposedly forecloses this argument. Plaintiff does not  
17 dispute that the DOT is an administratively-recognized source of information, but contends the  
18 ALJ still had an obligation to ensure the VE testimony relied on was up to date and reliable. In  
19 addition, Plaintiff argues that the DOT is not the only source of job information an ALJ may rely  
20 on, as the ALJ "will take administrative notice of reliable job information available from various  
21 governmental and other publications." 20 C.F.R. § 505. 1566(d), 20 C.F.R. § 404.1560; SSR 00-  
22 4p. Plaintiff maintains that USDOL statistics and O\*NET are governmental publications of  
23 which the ALJ could take administrative notice.

1       The Commissioner argues that the ALJ correctly overruled Plaintiff's objection because  
2 the ALJ was permitted to rely on the VE's testimony that Plaintiff could perform these jobs under  
3 the DOT; the regulations require the ALJ to take administrative notice of the DOT; and, the ALJ  
4 is only required to resolve conflicts between the VE's testimony and the DOT.

5       At step five, the Commissioner has the burden "to identify specific jobs existing in  
6 significant numbers in the national economy that [the] claimant can perform despite her  
7 identified limitations." *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). "In making this  
8 determination, the ALJ relies on the DOT, which is the primary source of reliable job  
9 information regarding jobs that exist in the national economy." *Zavalin v. Colvin*, 778 F.3d 842,  
10 845-46 (9th Cir. 2015) (citation omitted). The Agency also takes administrative notice of reliable  
11 job information from various governmental and other publications. By way of example, the  
12 regulations discuss: County Business Patterns, published by the Bureau of the Census; Census  
13 Reports, published by the Bureau of the Census; Occupational Analyses, prepared for the Social  
14 Security Administration by various State employment agencies; and the Occupational Outlook  
15 Handbook (OOH), published by the Bureau of Labor Statistics." 20 C.F.R. § 404.1566(d). "An  
16 ALJ may take administrative notice of any reliable job information, including information  
17 provided by a VE." *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).

18       Here, the ALJ relied on the DOT in determining Plaintiff could perform other jobs in the  
19 national economy. Plaintiff objected on the basis that and the information in the DOT is out of  
20 date, and these jobs are not currently performed at the unskilled level according to the O\*NET  
21 and Occupational Employment Statistics.

22       In *Shaibi v. Berryhill*, 883 F.3d 1102 (9th Cir. 2017), the Ninth Circuit noted that there is  
23 no authority "suggesting that an ALJ must *sua sponte* take administrative notice of economic

1 "data" from non-DOT sources. The court also pointed out that while "an ALJ is required to  
 2 investigate and resolve any apparent conflict between the VE's testimony and the DOT," there is  
 3 "no authority suggesting that the same is true for" non-DOT sources. *Id.* at 1109. In a footnote  
 4 the court discussed that 20 C.F.R. § 404.1566(d) lists data sources of which the SSA will take  
 5 administrative notice. *Id.* at 1109 n. 6. The court said: "It does not follow that an ALJ must in  
 6 every case reconcile conflicts *sua sponte* between each of those data sources and the VE's  
 7 testimony. That requirement was established in SSR 00-4p, a Social Security Ruling, only for the  
 8 DOT and an associated document." *Id.* The court went on to explain, that the DOT "is comprised  
 9 of self-contained descriptions of the requirements for performance of various jobs," but "using  
 10 the job distribution information in the CBP and OOH requires information and inferences not  
 11 contained in the documents themselves and so not amenable to an ALJ's *sua sponte*  
 12 consideration." *Id.*

13       In *Shaibi*, the court said that the claimant could raise the issue in a general sense before  
 14 the ALJ, and that the ALJ, on request, should permit the claimant to submit supplemental  
 15 briefing or interrogatories contrasting the VE's testimony with the claimant's evidence. *Id.* at  
 16 1110. If the ALJ did not address the supplemental briefing or interrogatories, the court said that  
 17 the claimant could raise new evidence casting doubt on the VE's job estimates before the  
 18 Appeals Council. *Id.*

19       Here, Plaintiff does not argue that the ALJ was required to address the O\*NET  
 20 information *sua sponte*; instead, Plaintiff specifically alerted the ALJ to the O\*NET information  
 21 in a post-hearing memorandum. The ALJ acknowledged that the regulations require her to take  
 22 administrative notice of *several sources of reliable job information*, including the DOT, and  
 23 permit the use of a VE to assist in the disability determination. She said that to the extent

1 Plaintiff argued that the job definitions in the DOT were outdated or unreliable, the argument  
 2 was foreclosed by regulation. Essentially, the ALJ said that since she relied on the VE's  
 3 testimony that was based on the DOT, she was precluded from considering other job  
 4 information.

5 First, section 404.1566(d) on its face provides that the SSA "will take administrative  
 6 notice of reliable job information available from various governmental and other publications"  
 7 and then gives some examples of such sources. The ALJ did not assert that the O\*NET does not  
 8 contain reliable job information.

9 Second, SSR 00-4p is not determinative of the issue here. That ruling requires an ALJ to  
 10 address an apparent conflict between VE testimony and the DOT. It does not state that these are  
 11 the only conflicts that must ever be resolved.

12 Third, *Shaibi* said that the ALJ did not have an obligation to *sua sponte* address a conflict  
 13 with non-DOT sources, but recognized that a claimant could raise such a conflict for the ALJ to  
 14 address. Plaintiff did so here. Instead of addressing the conflict and eliciting an explanation from  
 15 the VE that would justify relying on the VE instead of the O\*NET data, the ALJ vaguely stated  
 16 that Plaintiff's argument was precluded by regulation.

17 In *Ford v. Saul*, the Ninth Circuit acknowledged that a VE's testimony might not qualify  
 18 as substantial evidence if it conflicts with other evidence in the record. *Id.* at 1159. The court  
 19 noted that it had "long held that '*in the absence of any contrary evidence*, a [vocational expert's]  
 20 testimony is one type of job information that is regarded as inherently reliable; thus, there is no  
 21 need for an ALJ to assess its reliability.'" *Ford v. Saul*, 950 F.3d 1141, 1160 (9th Cir. 2020)  
 22 (emphasis added) (quoting *Buck v. Berryhill*, 869 F.3d 1040, 1051 (9th Cir. 2017)).  
 23

1 Here, there was *contrary* evidence in the record, that the ALJ should have addressed with  
 2 the VE before relying on the VE's testimony. If the ALJ could ignore the evidence presented by  
 3 the claimant just because it was not from the DOT, then there would be no point to raising the  
 4 objection and raising an objection was expressly contemplated in *Shaibi*.

5 For these reasons, the court finds it is appropriate to remand this matter so that the ALJ  
 6 can further evaluate the VE's testimony in light of Plaintiff's post-hearing memorandum  
 7 regarding the current skill level of the jobs identified by the VE, and if the ALJ intends to rely on  
 8 the VE's testimony, the ALJ should further consult the VE to reconcile his testimony with the  
 9 information cited by Plaintiff in the O\*NET.

10 **C. Mental Health Opinion Evidence**

11 Plaintiff argues that the ALJ erred when she failed to properly evaluate the mental health  
 12 opinion evidence: the opinions of Plaintiff's treating sources, Manda Sloan, PA-C, and Victor  
 13 Lopez, M.D. The Commissioner argues that the ALJ gave specific and legally supported reasons  
 14 for giving little weight to these opinions.

15 **1. Standard**

16 "Courts 'distinguish among the opinions of three types of physicians: (1) those who treat  
 17 the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining  
 18 physician); and (3) those who neither examine nor treat the claimant (nonexamining physicians).'"  
 19 *Garrison*, 759 F.3d at 1012 (quoting *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995)).

20 The Social Security Administration amended its regulations regarding the evaluation of  
 21 medical evidence for claims filed on or after March 27, 2017, so that there is no longer a hierarchy  
 22 for treating, examining or non-examining sources for those cases. See 20 C.F.R. § 404.1520c(a),  
 23 416.920c(a). This claim was filed before March 27, 2017; therefore, the new regulations are not

1 applicable. For claims filed before March 27, 2017, 20 C.F.R. §§ 404.1527 and 416.927 govern  
 2 how an ALJ must weigh medical evidence. Those regulations afford "treating sources" controlling  
 3 weight in certain circumstances. *See also* Social Security Ruling (SSR) 96-2p, 1996 WL 374188  
 4 (July 2, 1996).<sup>3</sup> Even when the treating sources are not given controlling weight, they are still  
 5 entitled to deference. *Id.*

6 The Ninth Circuit has similarly held that "[a]s a general rule, more weight should be given  
 7 to the opinion of a treating source than to the opinion of doctors who do not treat the claimant."  
 8 *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (citation and quotation marks omitted).  
 9 "[T]he opinion of a treating physician is thus entitled to greater weight than that of an examining  
 10 physician, [and] the opinion of an examining physician is entitled to greater weight than that of a  
 11 non-examining physician." *Id.* (citation omitted). "If a treating physician's opinion is well-  
 12 supported by medically acceptable clinical and laboratory diagnostic techniques and is not  
 13 inconsistent with the other substantial evidence in [the] case record, [it will be] given controlling  
 14 weight." *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014) (citation and quotation marks  
 15 omitted); *see also Revels v. Berryhill*, 874 F.3d 648, 854 (9th Cir. 2017) (citing 20 C.F.R.  
 16 § 404.1527(c)(2)). "The weight afforded a non-examining physician's testimony depends on the  
 17 degree to which [he or she] provide[s] supporting explanations for [his or her] opinions." *Garrison*,  
 18 759 F.3d at 1012 (citation and quotation marks omitted).

19 "To reject [the] uncontradicted opinion of a treating or examining doctor, an ALJ must  
 20 state clear and convincing reasons that are supported by substantial evidence." *Ryan v. Comm'r of*  
 21

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22<sup>3</sup> SSRs are "final opinions and orders and statements of policy and interpretations" issued by the  
 23 Commissioner. 20 C.F.R. § 402.35(b)(1). Although they do not have the force of law, in the  
 Ninth Circuit they are given deference "unless they are plainly erroneous or inconsistent with the  
 Act or regulations." *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 *Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citation omitted). To reject a treating or examining  
 2 doctor's opinion that is contradicted by another doctor's opinion, the ALJ must "provid[e] specific  
 3 and legitimate reasons that are supported by substantial evidence." *Garrison*, 759 F.3d at 1012  
 4 (citation and quotation marks omitted). "Where an ALJ does not explicitly reject a medical opinion  
 5 or set forth specific legitimate reasons for crediting one medical opinion over another, he errs."  
 6 *Garrison*, 759 F.3d at 1012 (emphasis added).

7 For claims filed before March 27, 2017, a physician's assistant, such as Ms. Sloan, was  
 8 considered an "other source" who may provide evidence to be considered in evaluating a disability  
 9 claim. 20 C.F.R. § 404.1513(d)(1). An ALJ must provide "reasons germane to each witness" to  
 10 discount "other source" evidence. *Molina v. Astrue*, 674 F.3d 1104, 1111-12 (9th Cir. 2012) (citing  
 11 *Turner v. Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1224 (9th Cir. 2010)).

12 **2. Analysis**

13 **a. Ms. Sloan's Opinions**

14 On March 2, 2016, Ms. Sloan filled out a mental health questionnaire regarding Plaintiff's  
 15 diagnoses of PTSD and related issues of agoraphobia, paranoia, and attention and learning  
 16 problems. (AR 1071-1074.) She indicated Plaintiff had disturbance of mood accompanied by full  
 17 or partial depressive syndrome and the following symptoms: anhedonia or pervasive loss of  
 18 interest in almost all activities; appetite disturbance with weight change; sleep disturbance  
 19 (nightmares and insomnia), psychomotor agitation, decreased energy, feelings of guilt or  
 20 worthlessness, difficulty concentrating or thinking, and paranoid thinking (extreme fear of harm  
 21 to her children). (AR 1071.) She noted Plaintiff was easily distracted, and had involvement in  
 22 activities with a high probability of painful consequences which are not recognized. (AR 1071.)  
 23 She also had constant fear something bad would happen; vigilance and scanning; motor tension;

1 persistent irrational fear of specific objections, activities or situations that result in a compelling  
2 desire to avoid the dreaded object, activity or situation; recurrent severe panic attacks at least once  
3 a week; and recurrent and intrusive recollection of traumatic experience which is a source of  
4 marked distress. (AR 1071-72.) Other symptoms included: poor memory, personality change,  
5 emotional lability, paranoia or inappropriate suspiciousness, very high hostility and irritability,  
6 somatization unexplained by organic disturbance, social withdrawal or isolation, and inappropriate  
7 affect. (AR 1072.)

8 Ms. Sloan further commented that Plaintiff was a manager at Denny's in the past, and now  
9 has such mood instability and fear of being in public, as well as angry and inappropriate outbursts,  
10 and memory impairment that Ms. Sloan did not anticipate she could ever return to this type of  
11 work. (AR 1072.) She described the clinical findings that demonstrate the severity of the mental  
12 impairment and symptoms as: mood dysregulation, impulsiveness, tearful, irrational fears,  
13 hypervigilance, nightmares, poor sleep, negative beliefs about herself and others. (AR 1072.) She  
14 said that Plaintiff's symptoms and limitations began with trauma in her childhood and became  
15 much worse since 2004. (AR 1072.)

16 Ms. Sloan opined that Plaintiff had marked restriction of activities of daily living; marked  
17 to extreme difficulty maintaining social functioning; extreme deficiencies in concentration,  
18 persistence or pace resulting in failure to complete tasks in a timely manner; extreme episodes of  
19 deterioration or decompensation which cause her to withdraw from the situation or experience  
20 with exacerbation of symptoms. (AR 1073.)

21 In addition, Ms. Sloan indicated that Plaintiff's psychiatric condition exacerbated her pain  
22 and physical symptoms, including back pain, headaches, foot pain and neuropathy. (AR 1073.)  
23 Ms. Sloan stated she did not believe Plaintiff could work at that time. (AR 1073.)

1 In her second decision, the ALJ incorporated her findings regarding Plaintiff's medical  
2 treatment from the first decision.

3 With respect to the mental health questionnaire filled out by Ms. Sloan, the ALJ stated that  
4 the medical opinions from Ms. Sloan appeared to be the product of a pre-printed questionnaire  
5 submitted to her by Plaintiff's attorney that included leading questions not designed for objective  
6 responses but for the verification of legal conclusions about the claimant's impairments. The ALJ  
7 also found that the opinions related to functional limitations were not supported with objective  
8 medical findings and were inconsistent with substantial evidence of record. The ALJ noted that  
9 Plaintiff did at times present with a constricted affect and depressed mood, but she was always  
10 cooperative, failed to exhibit objective signs of cognitive dysfunction, and was never noted to be  
11 responding to or distracted by internal stimuli. In addition, the ALJ said that Plaintiff's previously  
12 detailed high level of function was contrary to the significant limitations found by Ms. Sloan.  
13 Finally, the ALJ found that Ms. Sloan's opinions lacked professional honesty and suggested that  
14 she was acting as an advocate for Plaintiff and not an objective treating source. Therefore, the ALJ  
15 gave little weight to Ms. Sloan's opinions. (AR 151-152.)

16 First, "[w]hile an opinion cannot be rejected merely for being expressed as answers to a  
17 check-the-box questionnaire, ...'the ALJ may permissibly reject check-off reports that do not  
18 contain any explanation of the bases of their conclusions[.]" *Ford v. Saul*, 950 F.3d 1141, 1155  
19 (9th Cir. 2020) (citing *Popa v. Berryhill*, 872 F.3d 901, 907 (9th Cir. 2017), and quoting *Molina*  
20 v. *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012)). The ALJ did not reject the opinions of the pre-  
21 printed questionnaire on the basis that they were unexplained, but instead rejected them merely  
22 because they were expressed in such a form. This is impermissible. The ALJ stated that the  
23 questions were leading and sought legal conclusions, but a review of the form does not reveal this

1 to be the case. The court cannot discern any significant difference between this form and the forms  
2 the Agency itself uses in disability evaluations. Therefore, this was not a valid basis for rejecting  
3 the opinion.

4 Second, the ALJ stated that the opinions lacked professional honesty and suggested that  
5 she was acting as an advocate for Plaintiff and not an objective treating source. The ALJ did not  
6 explain what about the opinions indicated they lacked professional honesty or suggested she was  
7 acting as an advocate and not objectively. A review of the responses on the form itself does not  
8 review this; therefore, without further explanation the court finds this was not a germane reason  
9 for rejecting Ms. Sloan's opinions.

10 Finally, the ALJ's found that the functional limitations identified by Ms. Sloan were not  
11 supported with objective medical findings and were inconsistent with substantial evidence of  
12 record.

13 On March 3, 2014, Plaintiff saw Ms. Sloan to address her PTSD. She had a prior  
14 relationship that involved verbal and physical abuse, and her ex-boyfriend's parents reached out to  
15 her which was triggering. As a result she experienced nightmares and flashbacks. She reported that  
16 she would see people who reminded her of her ex, and she would "lose it." She had severe paranoia  
17 about someone taking her kids. (AR 611.) She was referred for PTSD treatment. (AR 613.)

18 Plaintiff had a mental health evaluation on March 13, 2014. She reported PTSD, anxiety  
19 and depression. She recounted that she had been in a car accident in 2004 and suffered headaches  
20 and chronic pain as a result. She was scared because of past abusive relationships, and feared  
21 someone would steal her kids. She also reported being raped and molested as a child. (AR 600.)  
22 She indicated that she was able to articulate her needs, was motivated to change and learn, had  
23 good verbal skills, was independent in skills of activities of daily living, she had insight into her

1 problems, a stable housing situation and supportive friends and family. (AR 604.) On examination,  
 2 she had good hygiene, was cooperative, and had no abnormal movements or gait. She had an  
 3 appropriate affect that was anxious and irritable. She was logical, goal directed, and reality based.  
 4 She had no perceptual disturbances. She was alert and oriented with normal attention and  
 5 concentration. She had an average fund of knowledge. She had no difficulties with articulation.  
 6 She had intact judgment and insight. (AR 605.) She met the criteria for PTSD due to significant  
 7 trauma and abuse, as well as her car accident, traumatic brain injury (TBI), domestic violence, rape  
 8 and molestation as a child. (AR 607.) She was referred for mental health outpatient treatment. (AR  
 9 609.)

10 On March 10, 2014, it was noted that she would be getting counseling in the future for her  
 11 PTSD. (AR 619.) She was calm, not depressed or anxious, and had a normal affect and thought  
 12 content at that time. (AR 620.) Ms. Sloan noted that therapy did not work out, but Plaintiff was  
 13 willing to see another therapist. (AR 622.) On July 3, 2014, it was indicated that she only attended  
 14 the evaluation and one therapy appointment. The therapist had referred her for "EMDR"<sup>4</sup> for her  
 15 PTSD, but she did not agree with the plan created by her therapist. (AR 1064.)

16 On August 28, 2014, Ms. Sloan indicated Plaintiff reported worsening depression and  
 17 anxiety with her ex getting out of prison. It was recommended that she seek mental health  
 18 treatment. (AR 1151.)

19 On October 6, 2014, Ms. Sloan described Plaintiff as having a long history of PTSD,  
 20 depression and anxiety. Plaintiff said she avoided leaving her house, and at times when she was  
 21 out in public she had to go home due to anxiety and panic. She feared harm coming to her children.  
 22 She suffered from domestic violence. She said that school never came easy to her, organization  
 23

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<sup>4</sup> Eye Movement Desensitization and Reprocessing Therapy.

1 was a problem, she struggled with following instructions, and was easily distracted and had  
2 difficulty sustaining attention. (AR 1059.) Her attention deficit hyperactivity disorder (ADHD)  
3 screening was positive, and it was recommended she establish care with Katrina Lennox, LCSW.  
4 (AR 1062.)

5 On March 27, 2015, Ms. Sloan saw Plaintiff for a medication review. Plaintiff recounted  
6 that she had been living with her boyfriend and he became more threatening and violent, and at  
7 one point she had to call the police and he was taken to jail. This caused her PTSD to flare up. She  
8 was stressed and fearful for her life and for her children. She did not want to go outside or in  
9 public. She had stopped her medications because she did not think they were helping. (AR 1053.)  
10 She was tearful at times. Her mood was fearful, anxious, and concerned, with a somber affect. She  
11 was again advised to establish care with Katrina Lennox, LCSW, for PTSD, and was encouraged  
12 to seek therapy. (AR 1056-57.)

13 On August 18, 2015, she reported that she had uncontrolled PTSD and anxiety. (AR 1020.)  
14 She was alert and cooperative, with a normal mood and affect, as well as a normal attention span  
15 and concentration. She was anxious and agitated. (AR 1024.)

16 In emergency room records from November 13, 2015, she complained that she fractured  
17 both feet when she was running for her life from that "weirdo." (AR 1600.)

18 Plaintiff saw Ms. Sloan on March 2, 2016, to discuss her long term disability application.  
19 They talked about her medical conditions, including PTSD, anxiety and depression. She explained  
20 that she had left her boyfriend when he became more verbally abusive. She had trust issues, and a  
21 fear of leaving home. She relied on her children to help with appointments and shopping. She had  
22 difficulty speaking at times and her speech would become slurred and she had a hard time finding  
23 words. She did not like being in crowds or around a lot of people. She had difficulty thinking

1 clearly. (AR 1115.) She had psychomotor agitation, a labile mood, and was anxious and frustrated.  
2 She had a tearful affect, and showed worry and irritability. She had racing thoughts and was easily  
3 distracted. Her insight was intact. (AR 1118.) Ms. Sloan recommended ongoing treatment for her  
4 PTSD, but Plaintiff indicated she did not want to do that at that point because she had not had a  
5 good experience with the therapist she had seen. (AR 1119.)

6 In her decision, the ALJ indicated that Plaintiff frequently attended her children's school events and  
7 independently cared for her home and five children. In addition, Plaintiff had started college  
8 classes in 2015, which suggested her social and cognitive abilities were not as limiting as she  
9 described. In addition, it was reported that Plaintiff was able to remain socially active and manage  
10 her own medication and finances, maintain an active daily lifestyle and exercise program. Finally,  
11 the ALJ said that the record does not show Plaintiff maintained on-going counseling therapy. (AR  
12 151.)

13 Plaintiff's mental health treatment records are minimal. Plaintiff has a definitive diagnoses  
14 of PTSD and related anxiety related to past incidents of domestic violence and a car accident,  
15 however, the minimal treatment records do not provide support for the marked functional  
16 limitations opined by Ms. Sloan, particularly when viewed in connection with the other evidence  
17 concerning her functional abilities. Therefore, the ALJ provided a valid, germane reason for  
18 discrediting Ms. Sloan's opinions, and remand is not appropriate on this basis.

19 **b. Physician Report by Ms. Sloan & Dr. Lopez**

20 Also on March 2, 2016, Dr. Lopez and Ms. Sloan completed a physician report for the  
21 Colorado Department of Health Services evaluation. They stated that Plaintiff's disability onset  
22 was December 14, 2004, noting that she suffered multiple injuries, but her PTSD started earlier.  
23 (AR 1076.) They opined Plaintiff was limited to sedentary work, but had no capacity to work at

1 that time. (AR 1077.) They said Plaintiff had a poor prognosis for significant improvement. (AR  
2 1077.) In addition, intense trauma therapy was recommended, but they said that resources for this  
3 were extremely limited in their area and would require travel to Durango, which Plaintiff could  
4 not afford. (AR 1077.)

5       The ALJ addressed the physician's report by Ms. Sloan and Dr. Lopez, but attributed it  
6 only to Dr. Lopez. (AR 150.) While Dr. Lopez said that Plaintiff's disability began in 2004, the  
7 ALJ said that a review of the record showed that Plaintiff worked from 2008 through 2011, which  
8 the ALJ found reduced the persuasiveness of Dr. Lopez's assessment. The ALJ acknowledged that  
9 Dr. Lopez recommended intense trauma therapy, noting that resources were limited  
10 geographically. The ALJ pointed out, however, that Plaintiff reported she enjoyed driving long  
11 distances as a type of self-therapy, which the ALJ found reduced the consistency of Dr. Lopez's  
12 brief conclusions. As such, the ALJ gave little weight to Dr. Lopez's opinions. (AR 150.)

13       The only argument Plaintiff makes regarding this report is that the ALJ mischaracterized  
14 Plaintiff's testimony, stating that Plaintiff actually testified that she loved to drive and it was  
15 therapeutic, but there was no indication she loved to drive long distances. (ECF Mo. 14 at 24:5-8,  
16 citing AR 75.)

17       Plaintiff testified that she loved to drive and that it was therapeutic. (AR 75.) She then  
18 testified that they were trying to find a mental health specialist for her, but she could not afford the  
19 travel expenses to go far away to see someone. (AR 80.) She said that to get to the hearing it was  
20 a three and a half or four hour drive, but she had to take a lot of breaks and it took her eleven hours  
21 to get there. She then testified that she loved to drive, and it was not abnormal for her to get in her  
22 vehicle and end up 1,300 or 1,400 miles away from everything, which she had done three or four  
23 times in the last year. (AR 86.)

1        '"The ALJ is responsible for determining credibility, resolving conflicts in medical  
2 testimony, and for resolving ambiguities." *Garrison*, 759 F.3d at 1009(quoting *Andrews v.*  
3 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). "If the evidence can reasonably support either  
4 affirming or reversing, 'the reviewing court may not substitute its judgment' for that of the  
5 Commissioner." *Gutierrez*, 740 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th  
6 Cir. 1996)). Here, there was evidence indicating both that Plaintiff could not afford to travel for  
7 care, and that she loved to drive and did in fact take very long drives. Since the evidence can  
8 support either position, the court will not substitute its judgment for that of the ALJ, and finds the  
9 ALJ set forth a legally sufficient reason for rejecting the statement that Plaintiff could not get the  
10 treatment she needed.

11                          IV. CONCLUSION

12                          IT IS HEREBY ORDERED that Plaintiff's motion to remand (ECF No. 14) is  
13 **GRANTED**, and the Commissioner's cross-motion to affirm (ECF No. 16) is **DENIED**. This  
14 matter is remanded, consistent with this Order, so that:

- 15 (1) the ALJ can further evaluate the VE's testimony in light of Plaintiff's post-hearing  
16 memorandum regarding the current skill level of the jobs identified by the VE, and if the ALJ  
17 intends to rely on the VE's testimony, the ALJ should further consult the VE to reconcile his  
18 testimony with the information cited by Plaintiff in the O\*NET; and  
19 (2) the ALJ can further evaluate the VE's testimony in light of Plaintiff's post-hearing  
20 memorandum regarding the current skill level of the jobs identified by the VE, and if the ALJ  
21 intends to rely on the VE's testimony, the ALJ should further consult the VE to reconcile his  
22 testimony with the information cited by Plaintiff in the O\*NET.

23

The Clerk shall enter judgment accordingly.

2 | Dated: August 17, 2020

Walter G. Cobb

William G. Cobb  
United States Magistrate Judge